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Tan Hoo Eng v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–456–09 OF 2018
YAACOB MD SAM, ZABARIAH YUSOF AND HARMINDAR SINGH JJCA
17 JULY 2019

C

Criminal Procedure — Appeal — Whether appeal incompetent — Accused facing several criminal charges in sessions court applied to High Court to strike out charges on grounds her constitutional rights had been infringed — High Court dismissed application on ground application premature as prosecution had yet to D *prove its cases against her — Whether High Court's dismissal of application decision that finally disposed of accused's rights and appealable — Whether accused's rights would only be finally disposed of when trial court decided on charges against her — Whether accused's appeal to Court of Appeal against High Court's dismissal of application was incompetent as it was not an appealable decision* E *— Courts of Judicature Act 1964 s 3*

The instant appeal was against the High Court's dismissal of the appellant's application ('NOM') to set aside/quash/strike out several charges that were filed against her in three criminal cases in the sessions court. In the NOM, the F appellant also asked the High Court to acquit and discharge her of all the charges and to strike out an order that was made to seize her properties under s 50(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA'). At the start of the appeal hearing, the respondent raised the preliminary objection ('the PO') that G the order dismissing the NOM was not a final decision (as envisaged under s 3 of the Courts of Judicature Act 1964) that was appealable since it did not finally dispose of the appellant's rights; that the appeal was therefore incompetent and should be dismissed. The appellant filed the NOM when the prosecution charged her with fresh offences under s 409 of the Penal Code and s 4(1)(a) of H the AMLATFA after she was given a discharge not amounting to an acquittal ('DNAA') in respect of various previous charges against her under those laws. In support of its PO, the respondent said the High Court dismissed the NOM because it was premature as it was made before the prosecution could complete its case against the appellant on the re-filed charges. In opposing the PO, the I appellant said that the repeated re-filing of fresh charges against her under the aforesaid laws breached her constitutional rights, under arts 5 and 13 of the Federal Constitution, to a right to a fair trial, fair investigation, fair hearing within a reasonable time and the right to property and livelihood. She alleged that the investigations into the alleged offences against her had been shoddy,

biased, selective and mala fide and that the prosecution had grossly delayed the trial of the cases. The appellant argued that the High Court had made a final decision when it dismissed the constitutional grounds she had raised in the NOM because she could not raise those issues again before the trial court.

Held, upholding the PO and dismissing the appeal:

(1) The High Court's decision in dismissing the NOM was not a final decision which disposed of the final rights of the appellant and thus was not appealable. The final rights of the appellant would only be disposed of when the trial court decided on the charges that were filed against her. The appeal herein was therefore incompetent (see paras 48–49).

(2) The definition of the word 'decision' in s 3 of the Courts of Judicature Act 1964 excluded any ruling made in the course of a trial or hearing of any cause or matter which did not dispose of the rights of the parties. The High Court's dismissal of the NOM was made during 'the course of a trial or hearing' as the prosecution had not closed its case against the appellant. The prosecution was also in the midst of proving its case when the decision dismissing the NOM was made. At that stage, the appellant's rights in relation to the charges had not been finally disposed of. There was no final decision in relation to the charges (see paras 28–31).

(3) The prosecution had to prove the charges against the appellant. The appellant was not deprived of the right to cross-examine the prosecution's witnesses. If the investigation was shoddy or incomplete, this would manifest at the end of the prosecution's case. Similarly, if the appellant was a victim of selective prosecution, this too would show up in the evidence at trial. It was premature for the appellant to allege now that there had been incomplete investigation or selective prosecution or a breach of her right to a fair hearing or a suppression of facts and evidence which warranted the charges against her to be struck out when the full evidence of the case had yet to be heard. The delay in the prosecution of the charges was not itself a ground for the charges to be struck out. There was no specific allegation that the alleged delay had prejudiced the appellant. The prosecution was entitled to apply for a DNAA of previous charges and prefer a fresh set of charges against the appellant. In this regard, see ss 254 and 376 of the Criminal Procedure Code and art 145(3) of the Federal Constitution (see paras 33–39).

(4) The appellant was not deprived of her right to appeal (if need be) after the conclusion of the trial. Her right of appeal was not compromised, as the same issues could be raised at the main appeal provided the case was tried to its very end. With regard to her property that was seized, if the prosecution failed to prove the charges against the appellant at the end of the trial, the properties would be returned to her under the relevant provisions of the AMLATFA (see paras 46–47).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan perayu ('NOM') untuk mengetepikan/menolak/membatalkan beberapa tuduhan yang difailkan terhadapnya dalam tiga kes jenayah di mahkamah sesyen. Dalam NOM, perayu juga memohon kepda Mahkamah Tinggi untuk membebaskan dan melepaskan beliau dari semua pertuduhan dan membatalkan perintah yang telah diberikan untuk merampas hartanah beliau di bawah s 50(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('Akta'). Pada permulaan pendengaran rayuan, responden membuat bantahan awal ('PO') bahawa perintah untuk menolak NOM bukanlah keputusan muktamad (seperti yang dijelaskan di bawah s 3 Akta Mahkamah Kehakiman 1964) yang mana boleh dirayu memandangkan ianya tidak menafikan hak perayu; bahawa rayuan itu tidak boleh dipertahankan dan haruslah ditolak. Perayu memfailkan NOM apabila pihak pendakwaan menuduh beliau dengan pertuduhan baru di bawah s 409 Kanun Keseksaan dan s 4(1)(a) Akta selepas beliau dilepaskan tanpa dibebaskan ('DNAA') atas pelbagai pertuduhan sebelumnya terhadap beliau di bawah undang-undang tersebut. Dalam menyokong PO, responden menyatakan bahawa Mahkamah Tinggi menolak NOM kerana ianya adalah pra-matang dan dibuat sebelum pihak pendakwaan dapat menyelesaikan kesnya terhadap perayu di atas pertuduhan yang difailkan semula. Dalam menentang PO, perayu mengatakan bahawa pemfailan semula pertuduhan baru berulang kali terhadap beliau di bawah undang-undang tersebut telah melanggar hak beliau di bawah perlembagaan, sepertimana perkara 5 dan 13 Perlembagaan Persekutuan, hak untuk perbicaraan yang adil, siasatan adil, pendengaran yang adil dalam masa yang munasabah dan hak untuk harta dan mata pencarian. Beliau mendakwa bahawa siasatan ke atas kesalahan yang didakwa terhadapnya adalah buruk, berat sebelah, selektif dan mala fide dan bahawa pihak pendakwaan telah menunda perbicaraan kes-kes tersebut dengan sengaja. Perayu menghujahkan bahawa Mahkamah Tinggi telah membuat keputusan yang muktamad apabila menolak alasan perlembagaan yang telah dibangkitkannya di NOM kerana dia tidak dapat membangkitkan semula isu tersebut dihadapan mahkamah perbicaraan.

Diputuskan, mengekalkan PO dan menolak rayuan tersebut:

(1) Keputusan Mahkamah Tinggi dalam menolak NOM bukanlah suatu keputusan akhir yang menafikan hak perayu dan yang mana tidak lagi boleh dirayu. Hak akhir perayu hanya akan dilupuskan apabila mahkamah perbicaraan memutuskan segala pertuduhan yang difailkan terhadap beliau. Oleh itu rayuan di sini adalah tidak kompeten (lihat perenggan 48–49).

(2) Definisi perkataan 'keputusan' dalam s 3 Akta Mahkamah Kehakiman 1964 tidak termasuk apa-apa keputusan yang dibuat semasa suatu

perbicaraan atau pendengaran sesuatu kausa atau perkara yang tidak melupuskan hak-hak pihak-pihak. Keputusan Mahkamah Tinggi yang menolak NOM dibuat semasa 'perbicaraan atau pendengaran' kerana pendakwaan tidak menutup kesnya terhadap perayu. Pendakwaan juga sedang membuktikan kesnya apabila keputusan untuk menolak NOM dibuat. Pada peringkat tersebut, hak perayu berhubung dengan pertuduhan itu belum diputuskan. Tidak ada keputusan yang muktamad dibuat berhubung dengan pertuduhan tersebut (lihat perenggan 28–31).

(3) Pihak pendakwaan perlu membuktikan pertuduhan terhadap perayu. Perayu tidak dinafikan hak untuk menyoal balas saksi-saksi pendakwaan. Sekiranya siasatan itu tidak bermutu atau tidak lengkap, ini akan dibuktikan pada akhir kes pendakwaan. Begitu juga, jika perayu adalah mangsa pendakwaan terpilih, ini juga akan dibuktikan melalui keterangan semasa perbicaraan. Ia adalah pra-matang bagi perayu untuk menyatakan pada peringkat ini bahawa terdapat siasatan yang tidak lengkap atau pendakwaan terpilih atau pelanggaran haknya untuk pendengaran adil atau penindasan fakta dan keterangan yang membenarkan dakwaan terhadapnya dibatalkan apabila keterangan sepenuhnya kes itu belum didengar. Kelewatan pendakwaan dalam membuat pertuduhanan itu bukan merupakan alasan untuk pertuduhan tersebut dibatalkan. Tidak ada dakwaan yang nyata bahawa kelewatan pertuduhan tersebut telah memprejudiskan perayu. Pihak pendakwa berhak untuk memohon DNAA terhadap pertuduhan terdahulu dan membuat pertuduhanan baru terhadap perayu. Dalam hal ini, lihat ss 254 dan 376 Kanun Tatacara Jenayah dan perkara 145(3) Perlembagaan Persekutuan (lihat perenggan 33–39).

(4) Perayu tidak dinafikan haknya untuk merayu (sekiranya perlu) selepas tamatnya perbicaraan. Hak beliau untuk merayu tidak terkesan, kerana isu yang sama dapat dibangkitkan pada rayuan utama dengan syarat kes itu telah diputuskan. Berkenaan dengan hartanah yang telah disita, jika pihak pendakwa gagal membuktikan pertuduhan terhadap perayu pada akhir perbicaraan, hartanah tersebut akan dikembalikan kepada beliau di bawah peruntukan relevan Akta (lihat perenggan 46–47).]

Notes

For cases on appeal in general, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 175–1125.

Cases referred to

Ahmad Zubair @ Ahmad Zubir Bin Hj Murshid v PP [2014] MLJU 991; [2014] 9 CLJ 289, FC (refd)

Babubhai v State of Gujarat & Ors [2010] 12 SCC 254, SC (refd)

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321; [1999] 1 CLJ 537, CA (folld)

A *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847; [2014] MLRAU 1, CA (refd)
Director of Public Prosecutions v Humphrys [1976] 2 All ER 497, HL (refd)
Hui Chi-ming v R [1992] 1 AC 34, PC (refd)
Karpal Singh a/l Ram Singh v PP [2012] 5 MLJ 293; [2012] 5 CLJ 537, FC
B (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, SC (refd)
Madheswardhari Singh and Anor v State of Bihar [1986] AIR (Pat) 324, SC
(refd)
C *Maria Chin binti Abdullah v PP* (Criminal Appeal No W-09-216-06 of 2016)
(unreported), CA (refd)
PP v Choo Chuan Wang [1992] 3 CLJ Rep 329, HC (refd)
R v Great Yarmouth Magistrate, ex p Thomas, Davis and Darlington [1992]
D Crim LR 116, QBD (refd)
R v Stubley; R v Wardle [1999] QB 822, QBD (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)

E **Legislation referred to**

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1)(a), 50(1), 52A, 55, 56(3), 87(1), 93
Courts of Judicature Act 1964 ss 3, 50
Criminal Procedure Code ss 254, 376, 422
F Evidence Act 1950 s 114(g)
Federal Constitution arts 5, 5(1), 13, 145(3)
Firearms (Increased Penalty) Act 1971
Penal Code s 409

G **Appeal from**: Criminal Application No AA-44–22–03 of 2018 (High Court, Ipoh)

Gurbachan Singh (Amir Faliq bin Mohamad Jamil and Siti Nor Syahidah Ismail with him) (Bachan & Kartar) for the appellant.
H *Nahra bt Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the defendant.*

Zabariah Yusof JCA:

I **[1]** The appeal before us is by the appellant against the decision of the learned judicial commissioner ('JC') dated 30 August 2018, in dismissing the application by the appellant vide her notice of motion ('NOM') dated 16 March 2018 wherein she applied, inter alia, that:

(a) the charges preferred against her under s 409 of the Penal Code in

Criminal Case No AA-62K-(37–38)-10 of 2017 be set aside and/or quashed and struck out and for further orders that the appellant be acquitted and discharged from all the charges thereof;

(b) the charges preferred against her under s 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA') read together with sub-s 87(1) of the AMLATFA in Criminal Case Nos AA-62K-(39–45)-10 of 2017 and AA-62K-(114–122)-12 of 2017 be set aside and/or quashed and struck out and for further orders that the appellant be acquitted and discharged from all the charges thereof; and

(c) the order of seizure under s 50(1) of the AMLATFA dated 24 July 2014 be struck out.

[2] At the commencement of the hearing of the appeal, the respondent raised a preliminary objection, in that the order by the learned JC in dismissing the NOM dated 30 August 2018 was not a final decision and that it is not appealable.

[3] After considering the oral and the written submission of parties, unanimously we found that the appeal herein is an incompetent appeal as the decision of the learned JC was not appealable and hence allowed the preliminary objection. Accordingly, we dismissed the appeal. Herein below are our grounds for deciding so.

SUBMISSION BY THE RESPONDENT ON THE PRELIMINARY OBJECTION

[4] The respondent submitted that the order by the learned JC was not a final decision which finally disposed of the rights of the appellant. The order which dismissed the NOM by the appellant is not appealable as it is not a 'decision' as envisaged under s 3 of the Courts of Judicature Act 1964 ('the CJA').

[5] In this case, the appellant filed a NOM at a stage after the charges under s 409 of the Penal Code and s 4(1)(a) of the AMLATFA read together with s 81 of the same filed on 15 July 2015 and 18 July 2016 were discharged not amounting to an acquittal ('DNAA') where the complainant was cross-examined by the defence counsel. Subsequently the appellant was recharged under s 409 of the Penal Code on 6 October 2017 and that the charges were read to the appellant on 8 December 2017.

[6] At the stage when the appellant filed the NOM, the prosecution has yet to complete calling its witnesses in proving a prima facie case against the appellant for the charges filed on 6 October 2017 and 8 December 2017.

[7] On 30 August 2018, after hearing submission of parties, the learned JC dismissed the NOM. Aggrieved, the appellant appealed to this court against that order by the learned JC.

[8] It is the respondent's stand that this order by the learned JC is not an appealable order as it is a procedural order. In support of this contention, the respondent referred to the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321; [1999] 1 CLJ 537 which was affirmed by the Federal Court (FC) in *Ahmad Zubair @ Ahmad Zubir Bin Hj Murshid v Public Prosecutor* [2014] MLJU 991; [2014] 9 CLJ 289 where the FC held that appeals against technical ruling are incompetent and hence are unappealable.

[9] Prior to *Ahmad Zubair Hj Murshid*, a similar ruling was also made in the case of *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293; [2012] 5 CLJ 537 where the FC echoed the same principle as in *Dato' Seri Anwar Ibrahim* and opined that a dissatisfied party is never deprived either of his right to appeal after the conclusion of a trial, in the event he feels aggrieved with the ruling made in the course of the trial, as that supposed error could be raised in the appeal proper.

[10] The respondent further submitted that this court should be slow in interfering in the conduct of the hearing and an order for the continued hearing of the case ought to be made. It is pertinent to take note of the reminder made by Lord Dilhorne in *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497, to judges to be wary of encroaching into the prerogative of the prosecutors in the institution, and conduct of prosecutions of cases and striking out of charges or discontinuance of prosecutions in criminal cases should only be exercised in the most limited or exceptional of circumstances. His Lordship's comments can be found at p 511:

> A Judge must keep out of the arena. He should not have or appear to have any responsibility from the institution of a prosecution. The function of the prosecutors and of the judges must not be blurred. If a judge has power to decline to hear a case he does not think it should be brought, then it soon may be thought that the case he allows to proceed are cases brought with his consent or approval.
>
> If there is any power ... to stop a prosecution on indictment in limine it should only be exercised in the most exceptional circumstances.

This stand was reiterated by Lord Salmon who agreed with Viscount Dilhorne where he said:

> I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a Judge has not and should not appear to have any responsibility for the institution of prosecution; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy it ought not to have been brought. It is only if the prosecution amount to an abuse of process of the court and is oppressive and vexatious that the judge had power to intervene.

[11] Hence, it is the submission of the respondent that the preliminary objection by the respondent ought to be allowed and that the appeal ought also to be dismissed as it is an incompetent appeal.

SUBMISSION BY THE APPELLANT IN RESPECT OF THE PRELIMINARY OBJECTION

[12] The thrust of the argument of the appellant in opposing the preliminary objection is premised on art 5 of the Federal Constitution, where it was submitted that the three constituent rights submerged in this article referred in this appeal are 'the right to a fair trial includes fair investigation', 'the right to a fair hearing within a reasonable time' and 'the right to property and livelihood'.

The right to a fair investigation

[13] On the right to a fair investigation, the appellant submitted that the right to a fair trial had been infringed when the investigating officer conducted an incomplete, one sided, biased, selective and mala fide investigation into only the complainant's report and ignoring the police report of the appellant which made very serious allegations of crime against the complainant. There has not been a fair investigation by the investigating officer as the appellant's version and the police report were not investigated at all. The respondent referred us to the case of *Babubhai v State of Gujarat & Ors* [2010] 12 SCC 254.

[14] The appellant alleged that the prosecution of the appellant three times without a fair and proper investigation is mala fide, oppressive and an abuse of court's process. The appellant referred to *Babubhai* where vitiated investigation resulting in tainted and malicious prosecution is liable to be quashed by the courts where non-interference by the courts would ultimately result in a failure of justice.

[15] The injustice caused to the appellant herein goes beyond the injustice of breach in fair investigation in *Babubhai*. The strong evidence of reduced number of charges amounts to unfair and improper investigation, inferred malice. It was submitted by the appellant that the issue of the right to a fair trial and complete investigation in which it comes within the protection under

art 5(1) of the Federal Constitution, has been finally disposed of by the learned JC.

Right to a speedy trial

[16] The appellant asserted that the DPP admitted and confirmed there was delay in the hearing of the proceedings in the sessions court. The second prosecution was brought one year after the first prosecution which caused the hearing dates fixed in 2016 to be vacated. There was no reasons given by the prosecution. The trial commenced in 2017 after two years delay from the first prosecution and three years after the complainant filed his police report. The prosecution applied for DNAA after two witnesses were called and it was at the stage where the complainant, as the second prosecution witness, gave a damning and self-incriminating evidence during the two days of cross-examination.

[17] After the order of DNAA, the appellant was recharged for far lesser charges which were four criminal breach of trust ('CBT') charges from the original nine and 54 AMLA charges from the original five out of 24 AMLA charges.

[18] Clearly, the prosecution caused the delay in having the hearing heard within a reasonable time. This infringes on the right to a fair hearing within a reasonable time, which entitled the appellant to an unconditional release and that the charges preferred against the appellant would fall (refer to *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242 and *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631).

The appellant submitted that the right of the appellant to a speedy trial was being violated by the prosecution/respondent which is a contravention of art 5(1) of the Federal Constitution. The judgment of the learned JC at para 32 considered such a right and at para 35 decided that there is no such violation. Hence the appellant submitted that the decision of the learned JC in this respect is a final decision, as the sessions court judge is bound by the decision of the learned JC and the appellant can no longer ventilate these grievances and issues at the trial in the sessions court.

Abuse of process

[19] The appellant also alleged that the second police report of the complainant which relates to charges in the first prosecution and the third prosecution was concealed and suppressed by the prosecution from the appellant and the High Court below.

[20] The prosecution committed deliberate suppression of facts and presentation of falsehood in regard to the second police report in the affidavit in reply at the High Court below which is the most serious kind of abuse of process intended to deceive the court.

Deprivation of property and the right to livelihood

Section 52A of the AMLATFA

[21] The learned JC decided that s 52A is not applicable, which the appellant submitted as a decision which constituted a finality in its effect. This is in relation to the appellant's right to property under art 13 of the Federal Constitution. Section 52A provides that:

> 52A A seizure order made under this Act shall cease to have effect after the expiration of twelve months from the date of the seizure order, or where there is a prior freezing order, twelve months from the date of the freezing order, if the person against whom the order was made has not been charged with an offence under this Act.

Pursuant to the decision by the learned JC on s 52A, it can no longer be argued before the sessions court. Hence it is a final decision as to the rights of the appellant on her properties.

Section 56(3) read together with s 93 of the AMLATFA

[22] Section 56(3) of the AMLATFA reads:

> 56(1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under section 4(1) or a terrorism financing offence, the Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a Judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is —
>
> (a) the subject-matter or evidence relating to the commission of such offence;
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> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence ...
>
> ...
>
> 56(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized ...

Section 93 of the AMLATFA provides that:

> No prosecution for an offence under this Act shall be instituted except by or with the written consent of the Public Prosecutor.

There is no written consent under s 93 of the AMLATFA for the first prosecution. Thus, the appellant submitted that it is an illegality. The AMLATFA proceedings in the first prosecution is null and void. Therefore the properties of the appellant ought to have been released pursuant to s 56(3) on 24 July 2015.

[23] If s 52A of the AMLATFA applies, the properties of the appellant ought to have been released on 30 April 2015 and 15 May 2015, respectively.

[24] The learned JC had decided that the absence of a written consent under s 93 of the AMLATFA is curable under s 422 of the CPC. The appellant submitted that this decision by the learned JC is a final decision where the right to property of the appellant had been disposed of and can no longer be argued before the sessions court.

[25] Counsel for the appellant referred us to the case of *Maria Chin binti Abdullah v Public Prosecutor* (Criminal Appeal No W-09–216–06 of 2016) (unreported) whereby it was submitted that the Court of Appeal allowed the appeal of the accused person when it set aside the refusal of the High Court to strike out the charge. However what was referred to us is a newspaper report of the 'The Star' online which we cannot accept as authority in support of the contention of the appellant. There is no written judgment of the said case. In any event that case relates to a charge premised on a provision that was declared unconstitutional by the Court of Appeal, which is not at all applicable to our present case. In our present case, the charge at the sessions court is very much a live issue.

OUR FINDINGS

[26] The submissions by the appellant hinged on the alleged breach of art 5 of the Federal Constitution by the respondent. Article 5(1) of the Federal Constitution provides that:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

In this respect the appellant submitted that art 5(1) of the Federal Constitution constitutes the three basic rights, namely:

(a) the right to a fair hearing based on a complete investigation into the charges preferred against the appellant by the investigating officer;

(b) the right to a speedy prosecution without any delay in prosecution of the trial of the appellant; and

(c) the right to property and livelihood.

[27] What we are concerned here is whether the learned JC in making his order dated 30 August 2018 was a final order that finally disposes the rights of the appellant. The preliminary objection by the respondent is premised on the fact that the appeal before us is not an appealable order.

[28] We agreed with the submission of the respondent that the appeal herein is an incompetent one by reason of s 50 of the CJA read with the definition section of the word 'decision' in s 3 of the same. Section 50 of the CJA states:

> 50 Jurisdiction to hear and determine criminal appeals
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any *decision* made by the High Court —
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or reversionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

Section 3 of the CJA defined the word 'decision' as:

> 'decision' means judgment, sentence or order, but does not include any *ruling made in the course of a trial or hearing* of any cause or matter which *does not dispose of the rights of the parties*.

[29] Section 3 of the CJA consists of two limbs, ie:

(a) the decision is made during the course of a trial or hearing of any cause or matter; and

(b) the decision does not dispose of the rights of the parties.

Both these limbs must be applied with equal force and given equal importance (refer to *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847; [2014] MLRAU 1; *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495).

[30] In the appeal before us, it is not denied that when the application in the NOM was made, the prosecution has not closed its case. The prosecution has not completed calling its witnesses to prove a prima facie case against the appellant for the charges filed on 6 October 2017 and 8 December 2017. Therefore it appears that the decision by the learned JC was at the stage of 'in the course of a trial or hearing' as stated under the first limb of s 3 of the CJA.

[31] As for the second limb of s 3 of the CJA, the prosecution was in the midst of proving a prima facie case, when the decision in dismissing the NOM was made. At this stage the rights of the appellant in relation to the charge had not been finally disposed of. It is not a final decision in relation to the charge in question and hence is not appealable. In support of this proposition, we refer to *Dato' Seri Anwar Ibrahim* which held that:

> In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory' by *Halsbury's Laws of England* (4th Ed) para 506 at p 240, which reads:
>
> > Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and *give no final decision on the matters in dispute*, but is merely on a matter of procedure, or (2) is made after judgment and merely directs how declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'. (Emphasis added.)

The FC in *Ahmad Zubair Hj Murshid v Public Prosecutor* held that:

> [38] From the above explanation given by this court in the case of *Dato' Seri Anwar Ibrahim v Public Prosecutor* it is obvious that parliament is not oblivious to appeals which tend to stall proceedings and delay speedy disposal of cases. The new defination of the word decision in the amended s 3 of the CJA which we have laid emphasis to in the preceding paragraph does not include a judgment, order or ruling which does not finally dispose of the rights of the parties on the matters in dispute. With the amended s 3 of the CJA, appeals filed based on technical rulings which are interlocutory in nature are now things of the past. Such appeals are incompetent to be laid before the appellate court as it is clearly precluded by law.

[32] The issues raised by the appellant are in relation to incomplete or biased investigation by the investigating officer, the delay in preferring charges against the appellant, the alleged suppression of facts by the prosecution and mala fide prosecution by the police and the attorney general. These according to the appellant infringed art 5 of the Federal Constitution.

[33] We failed to see how all these issues (assuming that it is true) infringed her right under art 5 of the Federal Constitution. To date there has been no determination on the charges preferred against the appellant. The prosecution is still at its infant stage of proving a prima facie. The prosecution will have to adduce evidence in proving the elements of the charges. The appellant is not deprived of the right to cross-examine the prosecution witnesses, including the investigating officer. If it is true that the investigation is shoddy or incomplete that resulted in the framing of the charges against the appellant, surely these will manifest at the end of the prima facie case. For the appellant to allege that there has been incomplete investigation by the investigating officer now which warrants the charges against her to be struck out (when the full evidence of the case has yet to be heard) is premature.

[34] On the allegation of selective prosecution whereby the appellant has been a victim, if that is true, will show in the course of the trial through the evidence. The prosecution has a duty to prove in the course of the trial all the elements of the charges against the appellant before an impartial judge who will preside over the case according to the rule of evidence and procedure. Again, as we have said before in the preceding paragraphs, for the court to decide now to struck out the charges and order an acquittal and discharge is prejudging the case before all the evidence are tendered, which no court of law is empowered to do.

[35] On the delay in prosecution of the charges against the appellant, that by itself is not a ground to strike out the charges and ordered a discharge amounting to an acquittal of the appellant on the charges. There is no standard time frame for charges to be preferred against an accused person. It all depends on the nature of the case and the charges to be preferred. In preferring charges under s 409 of the Penal Code and AMLATFA, often the charges rely substantially on documentary evidence which require time to collate to prove the charges. The prosecution is entitled to apply for a DNAA of charges against an accused person and there is nothing unlawful for the prosecution to prefer another set of charges against the appellant. On this we refer to s 254 of the CPC which provides that:

> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
>
> (2) At any stage of any trial before a Sessions Court or a Magistrate's Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.
>
> (3) Such discharge shall not amount to an acquittal unless the Court so directs.

Further art 145(3) of the Federal Constitution provides that 'the Attorney General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim Court, a native court or a court-martial'. This clause from the Federal Constitution gives the Attorney General wide discretion over the control, conduct and direction of any criminal prosecutions. Apart from having the power to institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted and the courts cannot compel him to institute any criminal proceedings which he does not wish to

institute or to go on with any criminal proceedings which he has decided to discontinue (refer to the Supreme Court's decision in *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152).

One must also not lose sight of s 376 of the CPC which provides that the Attorney General shall be the public prosecutor and shall have the control and directions of all criminal prosecutions and proceedings under the Criminal Procedure Code. This envisaged that the public prosecutor has a discretion as to what charges should be preferred, subject to the power of the court to amend charges if needs be in the course of the trial. The law gives a wide discretion over criminal prosecutions to the public prosecutor.

[36] There is nothing shown by the appellant that the act of the prosecution in preferring another set of charges after the DNAA of the earlier charges against the appellant constitute a breach of the right to a fair hearing. The hearing has just started and has not completed even at the prima facie stage and the charges against the appellant has not been determined. How could the appellant contended that she has not been accorded a fair hearing. It is too early in the day to make such allegations. The appellant would still be accorded the right to cross-examine the prosecution's witnesses at the prima facie stage and if defence is called, have her defence heard. Hence the submission by the appellant that there is already a finality on the deprivation of her rights to a fair hearing is clearly without merits.

[37] In considering the issue of delay, there must be a balance of the interest concerned, not only of the accused person but also interest of the society and public at large, in the enforcement of the law to curb crimes. There is also no specific allegation of prejudice against the appellant occasioned by the alleged delay. In support of this we refer to the very case cited by the appellant, that of *Public Prosecutor v Choo Chuan Wang* [1992] 3 CLJ Rep 329 at pp 333–334 where Edgar Joseph Jr J (as he then was) on one hand agreed with the decision in the Indian Supreme Court in *Madheswardhari Singh and Anor v State of Bihar* [1986] AIR (Pat) 324 in holding that 'Article 5 (1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an accused person can establish a breach of this right then, ... he would be entitled to an unconditional release and the charges levelled against him would fall to the ground'. However, Edgar Joseph Jr J also qualify such statement when he said as follows:

> The general proposition that criminal work should be disposed of with the least possible delay in order to avoid hardship to the accused who may be in custody or who in any case has the right to have the criminal accusation against him determined as soon as possible, cannot be disputed. On the other hand, the interest of justice do not mean that the interests of the accused only for we have to consider the interests of society at large in finding out wrongdoers and repressing crime and

> especially is this so in the case of a capital charge. The task of the Court must, in my view, take into account the practice and procedure of the Courts, the problems affecting the administration of justice in Malaysia, the length of the delay, the justification put forward by the prosecution, the responsibility of the accused for asserting his rights, the prejudice to the accused (if any) and generally, the particular circumstances of the case concerned.

One cannot help but notice that the facts in *Public Prosecutor v Choo Chuan Wang* shows a period of four years from the date when the charge was first preferred (15 July 1982) until the case was set down for trial the first time (24 February 1986). This concerns a charge under Firearms (Increased Penalty) Act 1971 which involves life sentence. The trial of the case finally commenced on 7 April 1987. The delay was due to counsel and the courts being indisposed elsewhere. But what is of importance as stated by the learned judge that due to the mounting backlog of criminal cases, substantial delays is inevitable and in the circumstances the court held that if the court is to accede to the objection of the defence counsel (that the prosecution's case is barred as the accused was denied his constitutional right to a fair hearing implied under art 5(1) of the Federal Constitution) that would mean that a large number of accused persons charged with capital offences could never be put on trial and so would have to be set free. Surely that cannot be in the public interest.

Further the court in *Public Prosecutor v Choo Chuan Wang*, at p 334 held that:

> Moreover, it is most material to note that the accused in this case had not alleged any specific prejudice, such as witnesses who had intended to call being untraceable or being incapable of giving evidence or the destruction or loss of other evidence or indeed any other prejudice, occasioned by reason of the delay.

In that case the court had overruled the objection and accordingly directed the trial of the case to proceed.

[38] Coming back to our appeal herein, the appellant failed to show in what way had the delay caused prejudice to the appellant whereby she has been deprived of a fair trial, when the trial had not finished even at the prima facie stage.

[39] On the allegation of the suppression of facts and evidence or falsehoods, that would relate to the charges preferred against the appellant. At this stage, there is nothing before the court to show that there is such suppression of evidence or facts. Even if (speculative) there is a suppression of facts or evidence or falsehoods before the court, the law has provisions inbuilt in the Evidence Act 1950 to remedy such situation eg s 114(g) or perjury. But to release and acquit or struck out the charges merely on mere allegations of deliberate suppressions of facts (which are serious in nature) before the disposal of the case, is again premature.

A **[40]** The appellant also submitted that the prosecution and investigating officer practice the act of charge first and investigate later after the first prosecution and the third prosecution. The prosecution in applying for the order of DNAA due to the unfavourable evidence given by the complainant had caused further delay of hearing and then after recharge, conducted
B investigation would constitute mala fide, oppression and abuse of police power of investigations and abuse of court's process.

[41] In an ideal situation, a charge would be preferred after all investigations
C are completed. However, there are occasions which warrants further investigations to be done. This does not necessarily mean that the prosecution is mala fide, oppression or abuse of the powers by the police or the prosecution. Ultimately, the issue is whether the prosecution is able to prove the charges against the appellant, and it is left to the sessions court judge to judge the case
D based on evidence tendered. This factor alone, cannot be a ground to state that the appellant is deprived of a fair hearing. In any event the burden is on the appellant to prove such allegations. In *R v Stubley; R v Wardle* [1999] QB 822, the courts referred to *R v Great Yarmouth Magistrate, ex p Thomas, Davis and Darlington* [1992] Crim LR 116 where the court said that:

E > Had there been mala fides, the court would have to think of the consequences of that. Here the magistrates' court was confronted with allegation of mala fides because the defence alleged that they had been victims of a rather unpleasant trick which deprived them of their liberty. The basis for that is not determined only in the magistrates' court upon whatever evidence is put before ... the burden of
F > establishing dishonesty lays fairly and squarely on the defence, and it was a heavy burden.

[42] Further in *Hui Chi-ming v R* [1992] 1 AC 34, the Privy Council had defined what is 'an abuse of process' as 'something so unfair and wrong that the
G court should not allow a prosecutor to proceed with what is in all other respects as regular proceeding'. At this stage how could there be a finality when there is nothing before the court to show that indeed there has been an abuse of process.

H **[43]** It is to be observed that these allegations of abuse of process, selective prosecution, mala fide prosecution with an extraneous purpose, involve questions of facts which we, as the appellate court are in no position to decide. These are best left to the trial court in determining questions of facts.

I **[44]** On the breach of AMLATFA provisions, art 13 of the Federal Constitution and the right of livelihood, the appellant submitted that the seizure order against the appellant had ceased to have effect. The properties of the appellant ought to have been released under the following three conditions but was not:

(a) ss 52A and 56(3) of the AMLATFA:

(b) no written consent under s 93 of the AMLATFA for the first prosecution rendering the first prosecution a nullity; and

(c) DNAA.

It was submitted by the appellant that the breach of the statutory provisions in AMLATFA has infringed the constitutional guaranteed right of the appellant under arts 13 and 5(1).

[45] The aforesaid issues raised by the appellant are all preliminary issues which does not disposed of the rights of the appellant *in relation to the charge*. The FC in *Ahmad Zubair Hj Murshid*, had emphasised on this point when it held as follows:

> [33] It can be seen from the above that the issues raised by the appellant were *preliminary issues* ie basically whether the charges were defective in substance and form. The High Court as stated earlier dismissed the appellant's application to strike out the charges and to have him acquitted and discharged. Clearly *the decision of the High Court was on a preliminary issue which did not finally dispose of the rights of the parties*. It is thus *not appealable.* (see *Dato' Seri Anwar Ibrahim v Public Prosecutor* [1999] 1 MLJ 321; [1999] 1 CLJ 537; *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 586; [2010] 9 CLJ 625; *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2011] 2 CLJ 845; *Public Prosecutor v Dato' Seri Anwar Ibrahim* [2014] 5 CLJ 805).
>
> ...
>
> [34] In this instant case *the appellant had applied before the High Court to quash the charges and order an acquittal against him. The application was dismissed.* The appellant had also applied before the sessions court for the charges to be quashed and prayed that a discharge not amounting to acquittal to be ordered against him. The application was also dismissed. The way we perceived it, *the orders of the courts below would connote that the matter should proceed for trial as the charges preferred against the appellant still stand.* Clearly *the decision not to strike out the charges before the commencement of the trial as was done in this instant case does not amount to disposal of the rights of the parties. Since the order gives no final decision on the matters in dispute, it is not a 'decision' within the definition under s 3 of the CJA and therefore is not appealable.* (Emphasis added.)

[46] Counsel for the appellant submitted that in the present appeal the decision is a final one as the appellant could not raise these issues of the infringement of the right to a fair hearing before the sessions court judge as the sessions court judge is bound by the decision of the learned JC in dismissing the application and that before the sessions court, only matters pertaining to the charges will be tried. Counsel appeared to have missed the point. The appellant will never be deprived of her right to appeal (if needs be) after the conclusion of the trial. The appellant's right of appeal is never compromised at all, as the same issues can be raised at the main appeal, provided the case is tried to its very end.

This proposition is stated by the FC in *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293; [2012] 5 CLJ 537 where the FC held that:

> [20] A scrutiny of the scope of the term 'decision' in s 3 of the CJA reveals that its definition does not extend to the types of 'judgments or orders' which can be termed as 'interlocutory'. In other words, if a judgment or order is not final, in the sense that it does not finally dispose of the rights of the parties in the trial, then it would not fall within the definition of the word 'decision' under section 3 of the CJA and thus not appealable ...
>
> [21] A dissatisfied party is never deprived either of his right to appeal after the conclusion of a trial, in the event he feels aggrieved with the ruling made in the course of the trial, as that supposed error could be raised in the appeal proper. Again Arifin Zakaria CJ in *Dato' Seri Anwar Ibrahim v Public Prosecutor* opined:
>
> > The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.

[47] On the property which had been seized, in the event the prosecution failed to prove the charges against the appellant at the end of the trial, the said properties will be returned to the appellant under s 55 of the AMLATFA which provides that:

> 55(1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be the subject-matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where —
>
> (a) the offence is proved against the accused; or
>
> (b) the offence is not proved against the accused but the court is satisfied —
>
> (i) that the accused is not the true and lawful owner of such property; and
>
> (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.
>
> (2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a fine.
>
> (3) In determining whether the property is the subject-matter of an offence or has been used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply the standard of proof required in civil proceedings.

CONCLUSION

[48] Given the aforesaid, unanimously we are of the view that the decision of the learned JC in dismissing the NOM was not a final decision which disposed of the final rights of the appellant. The final rights of the appellant would only be disposed of upon the trial court deciding on the charge against the appellant. The decision by the learned JC dated 30 August 2018 is thus not appealable.

[49] Therefore the appeal herein is an incompetent appeal. The preliminary objection by the respondent/prosecution is allowed and the appeal is dismissed.

Order accordingly.

Reported by Ashok Kumar